



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revised Final Guidance on Disseminating EPA's SBREFA Information Sheet to
Businesses at the Time of an Enforcement Activity

FROM: Eric V. Schaeffer, Director *Eric Schaeffer*
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Headquarters and Regional SBREFA Contacts
OGC SBREFA Contact
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Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
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This memorandum and the attached information sheet supercede both the March 26, 1999 and December 23, 1998 guidance and are in response to Regional questions on the Small Business Regulatory Enforcement Fairness Act (SBREFA) information sheet, which EPA began disseminating to small businesses in its regulatory enforcement programs on April 1, 1999. This memorandum also gives guidance on disseminating the information sheet in remedial enforcement activities under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the provisions of the Resource Conservation and Recovery Act ("RCRA") concerning corrective action and remediation of underground storage tanks, and the provisions of the Oil Pollution Act and Clean Water Act section 311 concerning remediation of oil and hazardous substance spills. The information sheet has been revised to include information about these activities.

As mentioned in prior guidance, EPA agreed that it would notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to SBREFA Section 222 in response to Small Business Administration¹ (SBA) and Congressional requests.² Recognizing that Regions will need time to train staff and to implement their plan for disseminating this information in the remedial context, we are informing SBA that EPA will not begin disseminating this information to small businesses in remedial enforcement actions until October 1, 1999.

The information sheet is intended to inform small businesses of their rights to comment to the SBREFA Ombudsman about EPA enforcement activity, as well as provide information on compliance assistance. As you will see from the attached, we tried to draft this language to remind the reader that SBREFA does not eliminate the responsibility to respond to a complaint, information request, or other enforcement activity within the time allowed nor does it create any new rights or defenses under law. We have also included language indicating that SBREFA does not affect EPA's ability to protect public health or the environment under any of the environmental statutes that EPA enforces, including the right to take remedial or emergency response action when appropriate.

The information sheet should be given to a small business at the time EPA has its *initial enforcement contact* with the business, which we have determined may include the following activities:

¹ SBA's SBREFA Ombudsman is charged with administering § 222 of SBREFA. Section 222, entitled "Oversight of Regulatory Enforcement" contains the SBREFA provision allowing small businesses to comment on agency enforcement activities, which may include audits, on-site inspections, compliance assistance efforts or other enforcement-related communication or contact by an agency.

² SBREFA's legislative history provides that the "SBA shall publicize the existence of the Ombudsman generally to the small business community and also work cooperatively with enforcement agencies to make small business aware of the program at the time of agency enforcement activity." Joint Statement of Senators Bond and Bumpers, March 29, 1996, Cong. Rec. S3242 (pp. S3242). To carry out this legislative intent, the SBA Ombudsman requested agencies to disseminate information about SBREFA to small businesses. SBA's small business definitions are codified at 13 C.F.R. 121.201.

- Inspection
- Warning letter
- Reminder notice or letter
- Compliance Audit Program or Incentive letter or notice
- Information collection request³
- Subpoena
- Show cause letter
- Administrative search or other warrant
- Stop sale, use, and removal order (SSURO)
- Notice of Violation or other notice letter
- Administrative complaint
- Administrative order or administrative penalty order
- Superfund general or special notice
- Cost recovery demand letter.

In general, it should only be necessary to distribute the information sheet once, at the time of the first formal enforcement contact. If appropriate, the information sheet may, in addition to the initial hand-out, be disseminated at later junctures in an enforcement activity at the Region's discretion. The SBA generally defines a small business as 500 employees or less although a business with as many as 1500 employees and up to \$25 million dollars in annual receipts may qualify as a small business depending on the SIC code involved (SBA's small business definitions are codified at 13 C.F.R. 121.201). If there is any question whether a business is small, the information sheet should be given to that business.

In response to the questions raised by your offices, we have made changes to this Guidance and to the Information Sheet, as summarized below.

Q: Should the information sheet be given out in criminal investigations or actions?

A: No. The information sheet should not be given out in criminal investigations or actions for several reasons. First, SBREFA is geared towards, and appears only to apply to, civil or administrative actions. Second, the leading role of Assistant United States Attorneys (or DOJ Trial Attorneys) in criminal investigations and prosecutions makes it inappropriate for EPA to unilaterally agree to provide this RegFair Notice in criminal investigations. Third, no other agency appears to be disseminating the sheet in criminal actions, including EPA's counterparts involved in environmental criminal investigations. Fourth, EPA is generally not able to disclose any information about criminal investigations or actions.

Q: Should the information sheet be given out in CERCLA (or Superfund), RCRA

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EPA generally considers the initial enforcement contact under CERCLA to occur at the general notice stage.

corrective action or UST remediation, or Oil Pollution Act remediation enforcement actions?

A: Yes. The information sheet should be give out when EPA has its initial enforcement contact with a small business (which, under CERCLA, is usually at the general notice stage) under CERCLA, the provisions of RCRA concerning corrective action and remediation of underground storage tanks, and the provisions of the Oil Pollution Act and Clean Water Act section 311 concerning remediation of oil and hazardous substance spills. The Office of Site Remediation Enforcement has decided as a matter of policy and program management that the SBREFA information sheet dissemination requirements set forth in this guidance will apply to enforcement of CERCLA and the other remediation statutes. In order to allow regional remediation enforcement staff to become familiar with these requirements, the information sheet need not be distributed for enforcement activities involving these statutes until **October 1, 1999**.

Q: Should the sheet be handed out after a matter has been referred to the Department of Justice?

A: No. In the unlikely event that the initial enforcement contact with a small business occurs after the matter has been referred, DOJ is responsible for determining whether the SBREFA information sheet will be handed out. As with all matters referred to DOJ, EPA employees should coordinate with DOJ before having any communication with current or potential defendants or with other outside individuals or agencies. As such, the December 23rd guidance suggesting that a civil judicial action is one of the junctures at which the information sheet should be handed out is corrected to read only "Administrative complaint."

Q: Should the information sheet be given out to small governments, such as a municipality operating a publicly-owned treatment work?

A: No. This information sheet should not be given to local, municipal or other government entities that may otherwise be defined as small (e.g., for purposes of the Small Communities Policy). We are developing a different information sheet for small government entities but because Section 222 of SBREFA, as well as the legislative history, indicate that the right to comment on agency enforcement activities does not apply to small government entities, the attached information sheet should go to small businesses only. Specifically, Section 222 differs from other parts of SBREFA (e.g., Section 223) in that it specifically refers to small businesses as opposed to small entities. However, EPA has determined, based on other applicable policies, that the information sheet should be given to Tribally-owned small businesses at the time EPA has its initial enforcement contact with the Tribally-owned small business.

Q: What type of training should we be giving staff?

A: The "training" we anticipated was informal discussion at staff and other meetings sufficient to ensure that the employees that would be handing the sheet out were aware of the requirement and knew who to contact if questions arose (the Regional SBREFA contact or Carolyn Dick at 202-564-4007).

Q: Should we be tracking or counting the number of information sheets handed out?

A: Yes, you should make a note to the file confirming that the information sheet was given to the business and, until further notice, track and count the number of sheets handed out.

Q: Should contractors responsible for inspections (or for any other activity when the sheet should be handed out) be required to hand out the information sheet?

A: Yes, if a contractor, doing the work of the EPA, is the first representative to come in contact with a small business at one of the above-listed junctures, then the contractor should hand the information sheet out to small businesses.

Q: Can the information sheet be revised to include regional-specific information and must those revisions be reviewed by SBREFA staff at Headquarters?

A: No, this sheet must be distributed verbatim to avoid confusion that could arise from paraphrasing, particularly in light of the concern that we be nationally consistent in informing small businesses of the resources and rights available to them. If a Region would like to add regional-specific information, the Region should draft a cover memorandum including that information and forward it to the Office of Regulatory Enforcement for approval to ensure a nationally consistent and accurate message. Any such memoranda can be sent via the LAN or mail to Carolyn Dick (mail code 2246A).

We appreciate the efforts the Regions have made to disseminate the information sheet to small businesses in regulatory enforcement activities beginning on April 1, 1999 and the efforts they will make to disseminate the sheet in remedial enforcement actions beginning October 1, 1999. Since EPA must update SBA of our progress disseminating the information sheet, we are requesting each Regional Enforcement Coordinator to inform Carolyn Dick and Bob Kenney via the LAN by October 5, 1999, that their Region has begun implementing this Guidance in remedial enforcement activities under CERCLA, RCRA and OPA.

We are sending each Region 5000 copies of the final Information Sheet with this Guidance. If you need additional copies or have any comments or questions, please call us or have your staff contact Carolyn Dick (ORE's contact at 202-564-4007) or Bob Kenney (OSRE's

contact at 202-564-5127). Thank you for your help in complying with SBA's request.

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